FILE COPY

FILED
APR 2 1970
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. ...1384

BUTELL ROBINSON and DONALD ROBINSON,
Petitioners,

versus

TRANSCONTINENTAL GAS PIPELINE CORPORATION,
Respondent.

EDWARD R. BREEDLOVE,
Petitioner

versus

TRANSCONTINENTAL GAS PIPELINE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

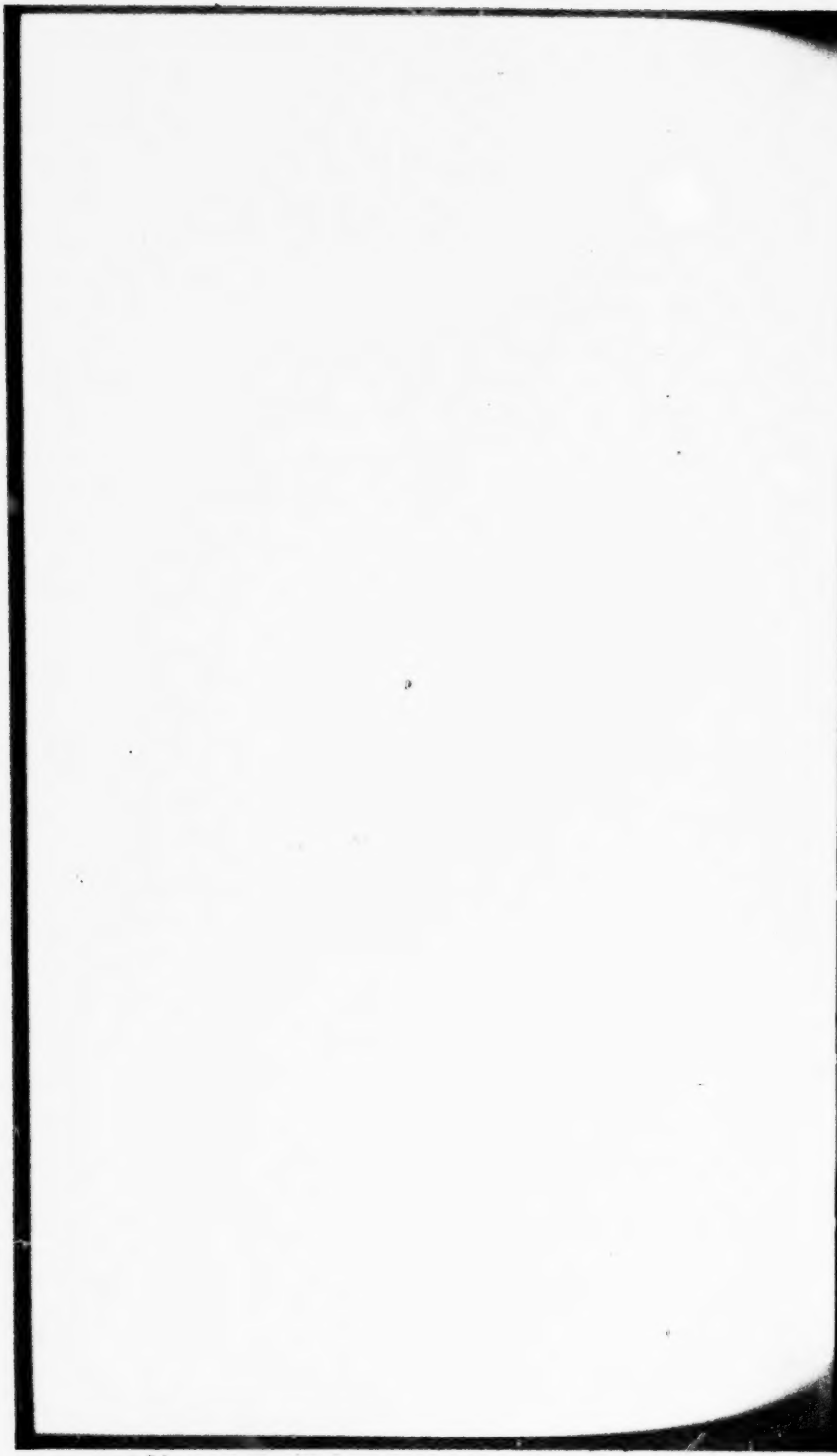
To the United States Court of Appeals for the Fifth Circuit

HOSEA ALEXANDER STEPHENS
2334 National Bank of Georgia Building
Atlanta, Georgia 30303
Attorney for Petitioners

JOSEPH E. CHEELEY
Buford Commercial Bank Building
Buford, Georgia 30518

BRACKETT, ARNALL & STEPHENS
2334 National Bank of Georgia Building
Atlanta, Georgia 30303
Of Counsel

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477



BLEED THROUGH, POOR COPY

INDEX

	Page
Prayer	1
Opinions below	2
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement of the case	3
Reasons for granting the writ	6
I. The Natural Gas Act has been ignored	7
II. The decisions of this Court have been ignored	9
III. The regulatory scheme established by Congress is avoided	10
Conclusion	12
Appendix I—Order of District Court filed May 27, 1969	A-1
Appendix II—Circuit Court of Appeals opinion	A-14
Appendix III—Judgment of Court of Appeals	A-16
Appendix IV—Order on petition for rehearing	A-18

Cases Cited

Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 591, 64 S. Ct. 281	11
Federal Power Commission v. Natural Gas Pipeline Co., 315 U. S. 575, 62 S. Ct. 736	10
First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U. S. 152, 66 S. Ct. 906	10

Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U. S. 498, 62 S. Ct. 384 9

Natural Gas Pipeline of America v. Illinois Commerce Commission, 33 Ill. 2d 214, 210 N. E. 2d 490 10

Oakland Club v. South Carolina Public Service Commission, 4 Cir., 110 F. 2d 84 10

Sigue v. Texas Gas Transmission Corporation (D. C. W. D. La.), 235 F. Supp. 155, affirmed 5 Cir., 354 F. 2d 40 8

Still v. Manufacturers Light and Heat Co., 39 F. P. C. 323 10,11

Thatcher v. Tennessee Gas Transmission Co., 5 Cir., 180 F. 2d 644 7

Statutes Cited

28 U. S. C., Section 1254(1) 2

28 U. S. C., Section 1332(a) 2

Georgia Code, Section 36-201-1 3,4,6

Natural Gas Act, 15 U. S. C. A., Section 717 et seq. 2,5,6,7,8

BLEED THROUGH POOR COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. .....

BUTELL ROBINSON and DONALD ROBINSON,
Petitioners,

versus

TRANSCONTINENTAL GAS PIPELINE CORPORATION,
Respondent.

EDWARD R. BREEDLOVE,
Petitioner

versus

TRANSCONTINENTAL GAS PIPELINE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

Butell Robinson and Donald Robinson, and Edward R. Breedlove, your petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on February 4, 1970.

OPINIONS BELOW

The opinion of the District Court, in reality an order granting a Summary Judgment (R. 80), has not been reported. Copy is appended hereto as Appendix I.

The opinion of the Court of Appeals has not been reported. A copy is appended hereto as Appendix II.

JURISDICTION

The judgment of the Court of Appeals (R. 100) was entered February 4, 1970. A Petition for Rehearing (R. 102) was denied March 3, 1970 without opinion.

Jurisdiction to issue the Writ is invoked pursuant to the provisions of Title 28, Section 1254 (1), United States Code.

Federal jurisdiction was invoked initially by petitioners at the time of filing their original complaints on the grounds of diversity of citizenship and amounts involved pursuant to the provisions of Title 28, Section 1332 (a) (1), United States Code.

QUESTION PRESENTED

Whether a Certificate of Convenience and Necessity, granted by the Federal Power Commission, is a condition precedent to exercise of the right of eminent domain by an interstate pipeline company subject to the Natural Gas Act [Title 15, Section 717, et seq.; U. S. C. A.]?

STATUTES INVOLVED

The specific United States statute involved is **Title 15, Section 717f, United States Code,** which provides inter alia

> "(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in

BLEED THROUGH POOR COPY

the transportation or sale of natural gas, subject to the jurisdiction of the commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the commission authorizing such acts or operations;

* * * * * * *

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of the property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipeline or pipelines for the transportation of natural gas . . . it may acquire the same by the exercise of the right of eminent domain in the District Court of the United States for the district in which such property may be located, or in the State courts. . . ."

The Georgia statute, which has been held herein to be applicable, is **Georgia Code, Section** 36-201.1:

"**Power of eminent domain conferred upon pipeline carriers of natural or artificial gas**—The power of eminent domain is hereby granted to and conferred upon persons who are or may be engaged in constructing or operating pipelines for the transportation and/or distribution of natural or artificial gas; and upon persons who are or may be engaged in furnishing natural or artificial gas for heating, lighting, and/or power purposes in the State of Georgia."

STATEMENT OF THE CASE

On or about October 29, 1964, Respondent caused a surveyor and two helpers to enter upon lands of Petitioners located in Gwinnett County, Georgia, survey a route for the center line of a right-of-way for a pipeline over

said lands, and cut bushes, small trees, and other undergrowth and plants growing thereon (R. 74).

Thereafter, on or about December 23, 1964, Respondent alleging that it ". . . is a natural gas company as defined by the Natural Gas Act and . . . transports gas in interstate commerce . . ." instituted proceedings in the Superior Court of Gwinnett County, Georgia, to condemn and acquire by eminent domain a right-of-way and easement for a pipeline through the same lands of Petitioners (R. 45-46). This proceeding was commenced pursuant to **Georgia Code Section** 36-201.1.

Notice of intention to condemn was served upon Petitioners requiring their appearance in the chambers of Honorable Charles C. Pittard, Judge of the Superior Court of Gwinnett County, Georgia (R. 57). When Petitioners appeared they were not represented by counsel, but Judge Pittard stated to them the right of Respondent to condemn their property was absolute, they could not contest its right to condemn, and the only remedy open to them was the naming of an assessor inasmuch as the only matter to be determined was the value of the property to be taken (R. 74-75).

The assessors made awards to Petitioners from which respondent appealed as provided by the Georgia statute (R. 34-35). The amounts of the awards were paid to Petitioners as required by the statute (R. 67). Thereafter, respondent entered upon property of the Petitioners with grading, ditch digging, and other large machinery, and uprooted trees, cut fences, tore up pasture and grazing lands, drained a small lake or fish pond on the premises of one of the Petitioners, dug trenches, laid lines of pipe therein, and began the transmission of natural gas through their property (R. 8).

Petitioners employed counsel and on December 1, 1966, defensive pleadings, consisting of answer and motion to

BLEED THROUGH POOR COPY

dismiss, were filed in the actions (R. 32-33). Respondent moved to strike the answers of petitioners (R. 25-26) and on July 11, 1967, order was entered overruling Petitioners' motions to dismiss but striking their answers (R. 24).

On April 14, 1967, Petitioners, in response to a letter written to the Federal Power Commission, learned for the first time that the condemnation proceeding had been instituted by respondent against them without obtaining a Certificate of Convenience and Necessity from the Federal Power Commission as contemplated by Section 7 (c) of the Natural Gas Act, and that such certificate was not granted to respondent until September 9, 1966. The Motions to Dismiss, filed by Petitioners and overruled by the Court, urged the non-existence of a Certificate of Convenience and Necessity (R. 33).

Petitioners then instituted action in the United States District Court for the Northern District of Georgia by verified complaint (R. 3-12) reciting the facts hereinbefore stated, alleging the condemnation action pending in the Superior Court of Gwinnett County, Georgia, had been calendared for trial and disposition during the week of October 16, 1967, offered to restore to Respondent the amounts awarded by the assessors either by deposit in the registry of the Court or as might otherwise be determined to be appropriate, prayed the recovery of $100,000.00 as damages, restraint of Respondent from further prosecution of the condemnation action, and general relief (R. 11-12).

Respondent answered (R. 13-20), asserting various defenses including failure to state a claim upon which relief can be granted, laches, estoppel, waiver, res judicata, the existence of a Certificate of Public Convenience and Necessity granted by the Federal Power Commission under Section 7 (c) of the Natural Gas Act prior to any actual

said lands, and cut bushes, small trees, and other undergrowth and plants growing thereon (R. 74).

Thereafter, on or about December 23, 1964, Respondent alleging that it ". . . is a natural gas company as defined by the Natural Gas Act and . . . transports gas in interstate commerce . . ." instituted proceedings in the Superior Court of Gwinnett County, Georgia, to condemn and acquire by eminent domain a right-of-way and easement for a pipeline through the same lands of Petitioners (R. 45-46). This proceeding was commenced pursuant to **Georgia Code Section** 36-201.1.

Notice of intention to condemn was served upon Petitioners requiring their appearance in the chambers of Honorable Charles C. Pittard, Judge of the Superior Court of Gwinnett County, Georgia (R. 57). When Petitioners appeared they were not represented by counsel, but Judge Pittard stated to them the right of Respondent to condemn their property was absolute, they could not contest its right to condemn, and the only remedy open to them was the naming of an assessor inasmuch as the only matter to be determined was the value of the property to be taken (R. 74-75).

The assessors made awards to Petitioners from which respondent appealed as provided by the Georgia statute (R. 34-35). The amounts of the awards were paid to Petitioners as required by the statute (R. 67). Thereafter, respondent entered upon property of the Petitioners with grading, ditch digging, and other large machinery, and uprooted trees, cut fences, tore up pasture and grazing lands, drained a small lake or fish pond on the premises of one of the Petitioners, dug trenches, laid lines of pipe therein, and began the transmission of natural gas through their property (R. 8).

Petitioners employed counsel and on December 1, 1966, defensive pleadings, consisting of answer and motion to

dismiss, were filed in the actions (R. 32-33). Respondent moved to strike the answers of petitioners (R. 25-26) and on July 11, 1967, order was entered overruling Petitioners' motions to dismiss but striking their answers (R. 24).

On April 14, 1967, Petitioners, in response to a letter written to the Federal Power Commission, learned for the first time that the condemnation proceeding had been instituted by respondent against them without obtaining a Certificate of Convenience and Necessity from the Federal Power Commission as contemplated by Section 7 (c) of the Natural Gas Act, and that such certificate was not granted to respondent until September 9, 1966. The Motions to Dismiss, filed by Petitioners and overruled by the Court, urged the non-existence of a Certificate of Convenience and Necessity (R. 33).

Petitioners then instituted action in the United States District Court for the Northern District of Georgia by verified complaint (R. 3-12) reciting the facts hereinbefore stated, alleging the condemnation action pending in the Superior Court of Gwinnett County, Georgia, had been calendared for trial and disposition during the week of October 16, 1967, offered to restore to Respondent the amounts awarded by the assessors either by deposit in the registry of the Court or as might otherwise be determined to be appropriate, prayed the recovery of $100,000.00 as damages, restraint of Respondent from further prosecution of the condemnation action, and general relief (R. 11-12).

Respondent answered (R. 13-20), asserting various defenses including failure to state a claim upon which relief can be granted, laches, estoppel, waiver, res judicata, the existence of a Certificate of Public Convenience and Necessity granted by the Federal Power Commission under Section 7 (c) of the Natural Gas Act prior to any actual

entry upon the land of the plaintiff the inhibitions of Title 28, Section 2283, United States Code, with respect to the enjoining of state court proceedings by a federal court, and a formal reply to the complaint admitting certain allegations, denying others, and exhibiting therewith portions of the proceedings in the Superior Court of Gwinnett County, Georgia (R. 21).

Thereafter Respondent moved for a summary judgment which, as hereinbefore noted, was granted (R. 80-97), and upon review the Fifth Circuit Court of Appeals affirmed (R. 100).

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit Court of Appeals, by its decision in the instant case, has ignored the clear, unequivocal language of the Natural Gas Act, **Title 15, § 717f(c), USCA**, requiring that there be

> ". . . in force with respect to such natural gas company a Certificate of Public Convenience and Necessity issued by the commission authorizing such acts or operations;"

before an interstate pipeline company is authorized to exercise the right of eminent domain;

II. The Fifth Circuit Court of Appeals, by its decision in the instant case, has ignored the clear, unequivocal language of the Natural Gas Act, **Title 15, § 717f(h), USCA**, conferring the right of eminent domain only upon

> ". . . any holder of a Certificate of Public Convenience and Necessity . . ."

III. The decision of the Fifth Circuit Court of Appeals in the instant case judicially approves the complete frustration of the scheme of regulation of interstate pipeline companies established by Congress in enactment of the Natural Gas Act, **Title 15, § 717f, USCA**, in that inter-

state pipeline companies may utilize state eminent domain statutes without obtaining a Certificate of Convenience and Necessity and never submit the matter to the Federal Power Commission for determination.

I

The Natural Gas Act Has Been Ignored

The Fifth Circuit Court of Appeals failed to follow the specific language of the Natural Gas Act, Title 15, Section 717f(c), USCA, which provides:

> "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, **unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations.**" [Emphasis supplied.]

Whether commenced in a Federal Court or a State Court, a pipe line company subject to the Natural Gas Act asserts **federally** created rights. **Authority** to condemn private property for pipe line purposes is conferred **only** upon the holder of a certificate of convenience and necessity granted by the Federal Power Commission pursuant to the Natural Gas Act, and particularly that portion of same quoted above.

Indeed in previous decisions the Fifth Circuit Court of Appeals had itself so held. One such is **Thatcher v. Tennessee Gas Transmission Co.**, 5 Cir., 180 F. 2d 644, and from which we quote:

"Indeed when Congress determined it in the public interest to regulate the interstate transportation and interstate sale of natural gas as provided by the Act of 1938 and the amendment of 1942, so that companies engaged in such business not only could not operate except under the authority provided by the statute, but could also be required to provide additions and extension of service, it was proper to make provision whereby the full statutory scheme of control and regulations could be made effective, by **the grant to such company of the right of eminent domain. The possession of this right** could well be considered necessary to insure ability to comply with the Commission requirements as well as with all phases of the statutory scheme of regulation."

* * * * * * * *

"If our conclusions are sound, and we think there can be no valid doubt as to this, it must be deemed established that the grant of the power of eminent domain provided by the Natural Gas Act is a regulation of interstate commerce by Congress and not the equivalent of engagement in such commerce as contended by the appellant."

When Respondent commenced proceedings against Petitioners in the Superior Court of Gwinnett County it was asserting a non-existent right because at that time **authority** to condemn had not been conferred upon it. The concluding phrase of the Natural Gas Act **[Title 15, Section 717f(h), USCA]** "or in the State Courts" merely grants permission for utilization of state-created machinery. This was clearly stated in **Sigue v. Texas Gas Transmission Corporation** (D. C. W. D. La.), 235 F. Supp. 155, affirmed 5 Cir., 354 F. 2d 40, thus:

"The state merely furnished the forum and the procedure."

In the instant case the State of Georgia has furnished the **authority**, the forum, and the procedure . . . obviously what Congress never intended.

II

The Decisions of This Court Have Been Ignored

The decision of the Fifth Circuit Court of Appeals is in direct conflict with and completely ignores decisions of this Court interpreting the Natural Gas Act. In **Illinois Natural Gas Co. v. Central Illinois Public Service Co.**, 314 U. S. 498, 62 S. Ct. 384, this Court established that a Certificate of Public Convenience and Necessity is a prerequisite to State Court action. Factually it appeared in that case the Illinois Natural Gas Company owned a pipe line system located wholly in the State of Illinois but whose transmission pipe lines connected at various points in Illinois with the main line of Panhandle Eastern. Central Illinois Public Service Company petitioned and obtained from the Illinois Commerce Commission an order requiring Illinois Natural Gas Company to supply it with natural gas and to establish a pipe line connection necessary for that purpose. The Certificate of Public Convenience and Necessity, provided for under the Natural Gas Act hereinbefore quoted had not been obtained. This Court held:

> "As Congress, by § 7 (a) (c) of the Act has given plenary authority to the Federal Commission to regulate extensions of gas transportation facilities and their physical connection with those of distributors, as well as the sale of gas to them, and **since no certificate of public convenience and necessity, required by § 7 (c), has been granted to appellant** by the Federal Commission for the proposed extensions and sale, **the state commission was without power to order them**". [Emphasis supplied.]

The substantive choice afforded by the decision in the instant case of proceeding under the Georgia statute without first obtaining a Certificate of Convenience and Necessity not only flies in the face of the statutory scheme adopted by Congress but creates serious constitutional implications for, as this Court noted in **Federal Power Commission v. Natural Gas Pipeline Co.**, 315 U. S. 575, 62 S. Ct. 736, 741:

> "The sale of natural gas originating in one state and its transportation and delivery to distributors in any other state constitutes interstate commerce, which is subject to regulation by Congress (cit.)"

Compare—

First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U. S. 152, 66 S. Ct. 906;

and

Natural Gas Pipeline of America v. Illinois Commerce Commission, 33 Ill. 2d 214, 210 N. E. 2d 490, recognizing that even the issuance of securities to finance pipeline construction is covered by the Natural Gas Act.

III

The Regulatory Scheme Established by Congress Is Avoided

The Fifth Circuit Court of Appeals in concluding that the Natural Gas Act did not

> ". . . require such a certificate as a condition precedent to the use of the Georgia statute"

cited **Oakland Club v. South Carolina Public Service Commission**, 4 Cir., 110 F. 2d 84, and **Still v. Manufacturers**

BLEED THROUGH POOR COPY

Light and Heat Co., 39 F. P. C. 323, in support of such conclusion.

These decisions themselves conflict with the specific language of the Natural Gas Act, as well as decisions of this Court hereinbefore noted. To demonstrate the erosion occasioned by this line of authority, Petitioners need do no more than invite attention to this Court's emphatic language in **Federal Power Commission v. Hope Natural Gas Co.**, 320 U. S. 591, 612, 64 S. Ct. 281, 291-292:

> "The Federal Power Commission was given broad powers of regulation.
>
> * * * * * * *
>
> By § 7 (b) it was given control over the abandonment of facilities or of service. And by § 7 (c), as originally enacted, **no natural gas company could undertake the construction or extension** of any facilities for the transportation of natural gas to a market in which natural gas was already being served by another company, or sell any natural gas in such a market, **without obtaining a** certificate of public convenience and necessity from the Commission." [Emphasis supplied.]

Congress obviously intended that interstate pipeline carriers assume definite responsibilities. This Court noted certain of same in the **Hope Natural Gas Case**, supra:

> "The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies. Due to the hiatus in regulation which resulted from the Kansas Natural Gas Co. case and related decisions state commissions found it difficult or impossible to discover what it cost interstate pipe-line companies to deliver gas within the consuming states; and thus they were thwarted in local regulation. H. Rep., No. 709, supra, p. 3. More-

COPY BOUND CLOSE IN CENTER

over, the investigations of the Federal Trade Commission had disclosed that the majority of the pipeline mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas supply for pipe-line transportation, had been acquired by a handful of holding companies. State commissions, independent producers, and communities having or seeking the service were growing quite helpless against these combinations. These were the types of problems with which those participating in the hearings were pre-occupied. **Congress addressed itself to those specific evils.**" [Emphasis supplied.]

CONCLUSION

The labors of Congress have been in vain if interstate pipeline carriers, aided by judgments of the District Courts, Circuit Courts of Appeal, and the Federal Power Commission itself, may avoid the provisions of the Natural Gas Act as has here been done.

Respectfully submitted

HOSEA ALEXANDER STEPHENS
2334 National Bank of Georgia Building
Atlanta, Georgia 30303
Attorney for Petitioners

JOSEPH E. CHEELEY
Buford Commercial Bank Building
Buford, Georgia 30518

BRACKETT, ARNALL & STEPHENS
2334 National Bank of Georgia Building
Atlanta, Georgia 30303
Of Counsel

BLEED THROUGH, POOR COPY

APPENDIX I

United States District Court
Northern District of Georgia
Atlanta Division

Butell Robinson and Donald Robinson versus Transcontinental Gas Pipe Line Corporation	Civil Action No. 11251
Edward R. Breedlove versus Transcontinental Gas Pipe Line Corporation	Civil Action No. 11252

ORDER

(Filed May 27, 1969)

Plaintiffs, landowners in Gwinnett County, Georgia, filed a suit against defendant, a natural gas pipe line company operating in interstate commerce (hereinafter referred to as Transco), for damages and injunctive relief, alleging that when defendant condemned their lands, pursuant to the power of eminent domain granted by the Natural Gas Act, 15 U. S. C., § 717f(h), without first obtaining a Certificate of Public Convenience and Necessity, required by § 717f(c), it trespassed on and damaged their lands. Defendant Transco responded that it condemned the land pursuant to the power of eminent domain granted it, not by any federal law, but by Georgia Laws, 1929, p. 219, § 1; Ga. Code Ann. § 36.201.1 (Supp. 1968), which did not require the federal Certificate of Public Convenience and Necessity, and that, in any event, plain-

tiffs were estopped, or barred by laches, from maintaining this suit at such a late date, after the pipeline was completed and placed into operation, at considerable expense to Transco. Transco also argued that the issues raised by plaintiffs had been resolved by a final judgment of the Gwinnett Superior Court, and that the doctrine of res judicata also barred the suit. Finally, to plaintiffs' request that this court stay the defendant's presently pending appeal from the condemnation award, defendant argued that this court would violate the provisions of 28 U. S. C., § 2283, if it did so. The court generally agrees with the defendant, as is more fully explained in this opinion, and hereby grants the motion for summary judgment on behalf of Transco.

The only difference in the two suits before the court is that different parcels of land are involved, owned by different plaintiffs, although the parcels are separated only by Level Creek Road. Plaintiffs Robinson ask $75,000.00 in damages; plaintiff Breedlove $100,000.00. All of plaintiffs' contentions are the same; the defendant's responses are the same. Moreover, both plaintiffs and defendant have filed joint briefs in the cases throughout the litigation. Therefore, this order will contemplate the two cases as one, raising necessary distinctions as they occur. The facts as reported herein are generally uncontested.

Plaintiffs own similar parcels of land near Buford, in Gwinnett County, Georgia. Transcontinental Gas Pipe Line Corporation is engaged in the transportation of natural gas in interstate commerce, and in the sale of interstate commerce of natural gas for resale and ultimate public consumption, in the states of Mississippi, Alabama, Georgia and intermediate states to New York, and is, therefore, a natural gas company within the meaning of § 7 of the Natural Gas Act, 15 U. S. C., § 717. In 1964,

FILED THROUGH POOR COPY

Transco began preparation for a lateral extension from a point on its main pipeline near Monroe, Georgia, extending to Ball Ground, Georgia, for the purpose of delivering natural gas to the Atlanta Gas Light Company, in the Atlanta market area. The route of the lateral extension lay across the property of plaintiffs. On December 23, 1964, after plaintiffs had rejected several offers by Transco to buy the land, Transco served on plaintiffs' notice of its intention to condemn a right-of-way for its pipe line, pursuant to Ga. Code Ann., § 36-304 (rev 1962). Three assessors were appointed for each parcel, one each by the parties, and one by the Superior Court of Gwinnett County, Georgia. On January 26, 1965, an award of $15,000.00 was made to the Robinsons, and an award of $11,000.00 was made to Breedlove, for the respective rights-of-way. From these judgments, Transco appealed to the Superior Court of Gwinnett County, alleging that the awards were excessive. This appeal is presently pending. However, a draft in the amount of the award was made payable to Breedlove on April 2, 1965, and to the Robinsons on January 11, 1966.

A Certificate of Public Convenience and Necessity was issued to Transco by the Federal Power Commission on September 9, 1966. On November 18, 1966, a clearing crew first entered the Breedlove property, and, two days later, first entered the Robinson property.

Plaintiffs stated that they had not known that Transco had condemned the lands without first obtaining the certificate, until about December 1, 1966, at which time they immediately filed an answer and a motion to dismiss the condemnation suit. Plaintiffs alleged that, because Transco did not have the certificate, it was a trespasser upon their lands. Transco filed a demurrer to the plaintiffs' answer and a motion to strike. Transco alleged, that because the condemnation proceeding followed the

state procedure outlined in Ga. Code Ann., Title 36, there was no requirement or necessity for any Certificate of Public Convenience and Necessity for the condemnation to proceed. It also alleged that plaintiffs were estopped, by their participation in the assessors' hearing and their acceptance of the assessors' award, to contest the right of condemnor to condemn condemnees' property. In addition, Transco alleged that plaintiffs were barred by laches, in remaining idle for a period of nearly two years from December 23, 1964, to December 1, 1966. Finally, Transco alleged that the condemnor's right to condemn could not be raised in a condemnation proceeding, under Ga. Code Ann., Title 36, Chapter 3. On July 11, 1967, Judge Charles C. Pittard, of the Gwinnett Superior Court, denied plaintiffs' motion to dismiss the condemnation proceedings, and granted Transco's demurrer to the answer and motion to strike the answer, ". . . on each and every ground set forth therein. . . ."

The Issues

The questions arise: (1) Whether the Georgia right of eminent domain, Ga. Laws, 1929, p. 219, § 1; Ga. Code Ann., § 36-201.1 (Supp. 1968), is concurrent with the federal right of eminent domain, 15 U. S. C., § 717f(h), and (2) whether the Certificate of Public Convenience and Necessity is required by § 717f(c), regardless of the power, state or federal, which the defendant elects to apply.

The Applicable Statutes

The Natural Gas Act, section 717f(c), which is called into question provides, in pertinent part:

> (c) No natural gas company . . . shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the

construction or extension of any facility therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company, a Certificate of Public Convenience and Necessity issued by the Commission authorizing such acts or operations. . . .

In addition, the Natural Gas Act, § 717f(h), also provides a power of eminent domain for the condemnation of rights-of-way:

(h) When any holder of a Certificate of Public Convenience and Necessity cannot acquire by contract, or is unable to agree with the owner of the property to the compensation to be paid for the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, . . . it may acquire the same by the exercise of the right of eminent domain in the District Court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the District Court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceedings in the courts of the State where the property is situated. . . .

However, in addition to the power of eminent domain conferred upon natural gas companies by the above statute, the Ga. Laws, 1929, p. 219, § 1; Ga. Code Ann., § 36.201.1 (Supp. 1968), the Georgia Act of 1929, conferred a similar power:

The power of eminent domain is hereby granted to and conferred upon [foreign and domestic corporations], who are or may be engaged in constructing or operating pipe lines for the transportation and/or

> distribution of **natural or artificial gas**; and upon [foreign and domestic corporations] who are or may be engaged in furnishing **natural or artificial gas** for heating, lighting, and/or power purposes in the State of Georgia (emphasis added).

The court observes, parenthetically, that plaintiffs have attempted to create an issue as to whether the above quoted section of Georgia Law is a viable statute. It is true that the statute was omitted, apparently inadvertently, when the Georgia Laws were codified in the Code of 1933. However, any concern as to the effect of this omission was eliminated by the case of **Botts v. Southeastern Pipeline Co.**, 190 Ga. 689 (1940), when the court stated, in reference to the omission:

> We thus see that at the time of the passage of the Act of 1937, sections 1 and 2 of the act of 1929 were both still intact as the law of Georgia, the one conferring power and the other providing method.[n] This we think is a sound statement of law. . . . 190 Ga. at 700.

Actually, the **Botts** case held that a later amendment to §2 of the Act of 1929, Ga. Laws, 1937, p. 432; Ga. Code Ann., § 36-202 (rev 1962), providing a method by which **petroleum products companies** could exercise the right of eminent domain, did not establish a right where none had existed before. But the court's dictum, quoted above, pertaining to **natural gas companies**, was clear. Plaintiffs' brief fails to recognize that, in this case, the defendant is a natural gas company, and does not deal in petroleum products as did the defendant in the **Botts** case. Therefore, Georgia Law does confer a right of eminent domain on natural gas companies, such as the defendant. **See also Harrell v. Southeastern Pine-line**

---

[n] Ga. Code Ann., § 36-202 (rev. 1962).

BLEED THROUGH POOR COPY

Company, 190 Ga. 709 (1940) (companion case following Botts).

The Law

In **Oakland Club v. South Carolina Public Service Authority**, 110 F. 2d 84 (4th Cir. 1940), the question before the court was whether the power of eminent domain, under the Eminent Domain Act of South Carolina, was concurrent with the power granted the condemnor, a public service corporation of the State of South Carolina, by § 21 of the Federal Power Act, 16 U. S. C., § 814:

> We think, under [the Federal Power] Act, that the condemnor has an election to exercise the power of eminent domain either under the specified enumerations of the Federal Power Act or under the broader provisions of the Eminent Domain Act of the State of South Carolina.
>
> In his opinion in this case, in the District Court, 30 F. Supp. 334, 341, Judge Myers said: "Looking at the two statutes together, I construe Section 21 of the Federal Power Act not as an exclusive law of eminent domain, not as abridging substantive rights granted to the defendant under the State law, but as complementary to the State law, and as enabling the holder of a Federal Power license to exercise in the Federal courts, as the defendant is doing, the substantive right of eminent domain granted to it under the State law."
>
> We approve this statement by the learned Judge below. The avowed purpose, the history and the philosophy of the Federal Power Act, we think, all seem to confirm this view. The Federal Power Act came to fulfill, not to destroy. It is a remedial statute enacted by the Federal Congress to extend the rights of eminent domain in favor of licensees under the Act. And in statutes of this character, the great

COPY BOUND CLOSE IN CENTER

> dictum of St. Paul: "The letter killeth but the spirit giveth life," seems peculiarly applicable. Again, a careful reading of the Federal Power Act convinces us that it could not have been enacted by the Federal Congress with the idea that it is, in itself, a complete Statute of Eminent Domain. The statute, in connection with eminent domain, is too brief and leaves too many gaps. Had Congress intended this statute as a complete statute of eminent domain, which would serve to exclude the rights of the condemnor under a state law, we are convinced that this Statute would have been far more complete and would have included many provisions which are omitted.

110 F. 2d at 86.

Further, the court in **Chapman v. Public Utility District No. 1 of Douglas County, Washington**, 367 F. 2d 163, 167 (9th Cir. 1966), considering whether the condemnor was justified in taking a fee, rather than a flowage easement, pursuant to § 21 of the Federal Power Act, stated this dictum:

> The substance of the delegated federal power, however, may not be diminished by state law [numerous citations omitted], although the state may, if it sees fit, delegate to the federal licensee broader and additional authority from the state's own power of eminent domain, **Oakland Club v. South Carolina Public Service Authority**, 110 F. 2d 84, 86 (4th Cir. 1940).

The court can rely on the **Oakland Club** and **Chapman** cases only by analogy, because they did not involve the Natural Gas Act, but involved the Federal Power Act. In this connection, the analogy between the eminent domain powers conferred by the two acts is strengthened by the following statement, which appeared in a report from the Federal Power Commission, reported in 1947

BLEED THROUGH POOR COPY

U. S. Code Cong. Serv. 1477, concerning the enactment of § 7h of the Natural Gas Act, 15 U. S. C. § 717f(h):

> The proposed amendment provides generally for the exercise of the right of eminent domain by natural-gas companies with respect to necessary rights-of-way in connection with the construction and operation of natural gas pipelines. This proposed amendment is similar to § 21 of the Federal Power Act which provides for the exercise of the right of eminent domain by licensees regarding dam sites.

The cases cited by plaintiffs for the proposition that a certificate is required before exercise of the concurrent state power of eminent domain fail to fulfill that promise. **Colorado-Wyoming Gas Co. v. FPC**, 324 U. S. 626, 89 L. Ed. 1235 (1945); **Illinois Pub. Serv. Co.**, 314 U. S. 498, 86 L. Ed. 371 (1942). Rather, they generally stand for the proposition that the Federal Power Commission has jurisdiction over interstate gas sales. Neither case addresses itself to the question raised here concerning the effect of a concurrent state power of eminent domain. The other cases cited by plaintiffs are also inapposite.

Under the Georgia law, there is no express or implied requirement that a natural gas pipeline company obtain a certificate prior to instituting condemnation proceedings. In addition, the **Oakland Club** and **Chapman** cases indicate that § 717f(h), conferring power of eminent domain does not superimpose the prerequisite of a certificate of the Georgia law. The court so holds.

In addition, such a concurrent grant of state power is distinguished from the mere exercise in state court of the federal grant of power by use of state procedure, or a procedure in the District Court, which conforms as nearly as possible with the local state procedure, as contemplated in § 717f(h). See **Williams v. Transcontinental Gas Pipe Line Corp.**, 89 F. Supp. 485 (W. D. S. C. 1950).

COPY BOUND CLOSE IN CENTER

The court further observes that § 717f(c), which section also requires a certificate, requires such a certificate only before the "construction or extension of any facilities", or before the company undertakes to "acquire or operate any such facilities or extensions thereof". Webster's Third New International Dictionary (1969) defines facility, in pertinent part, as ". . . something (as . . . machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end." Therefore, the "construction or extension of any facilities" refers to the construction of the pipe line itself rather than the condemnation of the right-of-way upon which the pipe line is to be laid. The same is true as to the acquisition of an extension of a facility. Under this reasoning, § 717f(c) does not prohibit condemnation without first obtaining a federal certificate, of the right-of-way upon which a pipe line is to be established, but only prohibits construction or acquisition before obtaining such a certificate.

Therefore, the court holds that Transco exercised the power of eminent domain granted it by Georgia Laws, 1929, p. 219, § 1; Ga. Code Ann., § 36-201.1 (Supp. 1968), and that, after it so elected to proceed under state law, no Certificate of Public Convenience and Necessity, was required by either § 717f(c), or § 717f(h).

The court's decision is fortified by several features of the case. First, the Natural Gas Act provides criminal sanctions for violations, 15 U. S. C., § 717(s)-(u), and does not expressly provide for private civil causes of action for damages. No case has been cited to the court, and the court is not aware by any other means, of any case which indicates that a so-called "Federal Common law" cause of action has arisen, such as has arisen pursuant to § 10(b)(5) of the Securities and Exchange Act of 1934, 15 U. S. C., § 78(j). See **Ruckle v. Roto American Corp.**,

BLEED THROUGH POOR COPY

339 F. 2d 24 (2d Cir. 1964); **Ellis v. Carter**, 291 F. 2d 270 (9th Cir. 1961); **Kardon v. National Gypsum Co.**, 73 F. Supp. 798 (E. D. Pa. 1947). Therefore, even if the condemnation suit in the state court is, as plaintiffs insist, merely the exercise of the federal power therein, which exercise is expressly permitted by § 717f(h), the remedy is not a private civil remedy for damages, but is a criminal action against defendant by the Attorney General of the United States.

Further, to grant plaintiffs' request for a stay of the defendant's appeal from the condemnation award, in the Superior Court of Gwinnett County, Georgia, would run afoul of 28 U. S. C., § 2283:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Again, even assuming that the use of the State court was not a concurrent exercise of power, but merely a use of state procedure incident to a federal power, the court is hard pressed to find authorization for a stay of the state court proceedings in the face of the express language of § 717f(h), which permits the use of the state procedure. Where the constitutionality of condemnation proceedings has been contested in the district court, the action has been dismissed, because to grant a stay would violate this section, the proper forum for contesting the constitutionality of such proceedings being the state court. See **Baber v. Texas Util. Co.**, 228 F. 2d 665 (5th Cir. 1956); **Collins v. Laclede Gas Co.**, 237 F. 2d 633 (8th Cir. 1956), **cert. denied** 352 U. S. 1025 (1957); **Evans v. St. Louis Housing Authority**, 226 F. 2d 750 (8th Cir. 1955). Although the constitutionality of the state condemnation proceeding is not being tested here, the applicability of

COPY BOUND CLOSE IN CENTER

a state power of eminent domain, vis-à-vis a federal power, is being tested. Therefore, the cases cited are at least persuasive as demonstrating to the court that it has no jurisdiction to decide the questions presented here. However, the court need not decide this issue, as its decision is based on grounds previously explained.

Further, the plaintiffs are estopped under Georgia law, by their acceptance of payment of the award, to contest the condemnation proceedings. See **Johnston v. Clayton County Water Authority**, 222 Ga. 39 (1966); **Williams v. City of LaGrange**, 213 Ga. 241 (1957); **Central of Georgia Ry. Co. v. Bibb Brick Co.**, 149 Ga. 38 (1919) (and cases therein cited). The Georgia statute, Ga. Code Ann., § 36-602 (rev. 1962), cited by plaintiffs for the proposition that the acceptance of the amount shall not prevent them from prosecuting an appeal, is not relevant to this proceeding, which is not an appeal. This is a separate suit, brought in another court, some two and one-half years after the ten day period for an appeal would have expired in the state condemnation proceeding, and the cases cited provide an independent ground on which to base summary judgment for defendant.

Also, defendant argues convincingly that the doctrine of laches bars plaintiffs' recovery. The court notes that the Notice of Condemnation Proceedings was filed on December 23, 1964, whereas plaintiffs' answer and motion to dismiss in the condemnation suit was not filed until December 1, 1966. Although plaintiffs allege that they had no counsel at the time, and that Judge Pittard of the Gwinnett Superior Court advised them that defendant's power to condemn was "absolute", ignorance of the law was no excuse. Ga. Code Ann., § 37-116 (rev. 1962). Plaintiffs could have addressed a letter to the Federal Power Commission, in order to contest the condemnation proceedings, at any time after December 23, 1964, rather

BLEED THROUGH POOR COPY

than waiting until April 4, 1967.[n] Finally, the suit in this court was not filed until October 4, 1967, after the pipe was installed and the gas was already flowing. See **Holt v. Parsons**, 118 Ga. 895 (1903), in which the court held, under the equitable doctrine of laches, that a delay of more than three months following a public furor over the location of a courthouse and the publication of the company who had accepted the bid for building the courthouse, barred the plaintiff from a suit to enjoin the building of the courthouse, when his suit was filed after considerable expense and effort had been expended in the building of the building. **See also Black v. Barnes**, 215 Ga. 827 (1960) (plaintiffs estopped to enjoin building of apartment buildings after three months while defendant made substantial expenditures).

Because of the court's decision in the matter, it need not consider Transco's contention that the dismissal by the Superior Court of Gwinnett County of the plaintiffs' answer and motion to dismiss was a final judgment, within the meaning of Georgia law, thus barring the plaintiffs from bringing this suit by the doctrine of res judicata.

For the above reasons, the motion for summary judgment is granted in both of the above cases for the Defendant, Transcontinental Gas Pipe Line Corporation.

So ordered this the 26 day of May, 1969.

Albert J. Henderson, Jr.
Judge, United States District Court for
the Northern District of Georgia

---

[n] On April 4, 1967, plaintiff Donald Robinson addressed a letter to the Federal Power Commission, inquiring about Transco's right-of-way. On April 14, 1967, the Commission replied, stating that the Certificate of Public Convenience and Necessity was obtained on September 9, 1966, and that the pipe line was complete and in service by March 1, 1967.

COPY BOUND CLOSE IN CENTER

APPENDIX II

Corrected
in the
United States Court of Appeals
For the Fifth Circuit

No. 28169

Butell Robinson and Donald Robinson,
Plaintiffs-Appellants,

versus

Transcontinental Gas Pipe Line Corporation,
Defendant-Appellee,

Edward R. Breedlove,
Plaintiff-Appellant,

versus

Transcontinental Gas Pipe Line Corporation,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Georgia

---

(February 4, 1970)

Before Jones, Bell, and Godbold,
Circuit Judges.

Per Curiam: The district court concluded in a full opinion that Transcontinental was empowered to condemn a right of way under the applicable Georgia Condemna-

tion statute, Ga. Laws, 1929, p. 219 et seq., Ga. Code Annot., § 36-201.1 (1969 Supp.); **Botts v. Southeastern Pipeline Company**, 190 Ga. 689, 700 (1940), although the Federal Power Commission had not issued a certificate of public convenience and necessity under the Natural Gas Act. 15 U. S. C. A., § 717f(c). We agree. The Georgia statute is a grant of the state power of eminent domain, separate and distinct from the federal power of eminent domain as granted under the Natural Gas Act, 15 U. S. C. A., § 717f(h). No such certificate is required under the Georgia statute nor does the Natural Gas Act require such a certificate as a condition precedent to the use of the Georgia statute. Cf. **Oakland Club v. South Carolina Public Service Commission**, 4 Cir., 1940, 110 F. 2d 84; **Stitt v. Manufacturers Light and Heat Co.**, 39 F. P. C. 323 (1968).

Affirmed.

APPENDIX III

In the United States Court of Appeals
For the Fifth Circuit

October Term, 1969

No. 28169

D. C. Docket Nos. CA 11251 and 11252
Butell Robinson and Donald Robinson,
Plaintiffs-Appellants,

versus

Transcontinental Gas Pipe Line Corporation,
Defendant-Appellee,

Edward R. Breedlove,
Plaintiff-Appellant,

versus

Transcontinental Gas Pipe Line Corporation,
Defendant-Appellee,

Appeals from the United States District Court
for the Northern District of Georgia

Before Jones, Bell and Godbold, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that plaintiffs-appellants pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate: February 4, 1970

APPENDIX IV

In the United States Court of Appeals
For the Fifth Circuit

No. 28169

Butell Robinson and Donald Robinson,
Plaintiffs-Appellants,

versus

Transcontinental Gas Pipe Line Corporation,
Defendant-Appellee,

Edward R. Breedlove,
Plaintiff-Appellant,

versus

Transcontinental Gas Pipe Line Corporation,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Georgia

---

ON PETITION FOR REHEARING

(Filed March 3, 1970)

Before Jones, Bell, and Godbold, Circuit Judges.

Per Curiam:

It Is Ordered that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

FILE COPY

FILED
MAY 4 1970
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1384

BUTELL ROBINSON and DONALD ROBINSON,
Petitioners,

versus

TRANSCONTINENTAL GAS PIPELINE CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALLEN POST
3300 First National Bank Tower
Atlanta, Georgia 30303
Counsel for Respondent

Of Counsel:

Albert G. Norman, Jr.
HANSELL, POST, BRANDON & DORSEY
3300 First National Bank Tower
Atlanta, Georgia 30303

W. Howard Fowler
WEBB & FOWLER
P. O. Box 27
Lawrenceville, Georgia 30245

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. The Court Of Appeals Correctly Decided An Issue Of State Law.	6
II. The Decision By The Court Of Appeals On Any Question Of Federal Law Collaterally Involved Was Correct And Not In Conflict With The Decision Of Any Other Court Or Tribunal.	7
III. The Alleged Reasons For Granting The Writ Are Completely Insufficient.	8
IV. The Decision Of The Court Of Appeals Was Correct On Several Independent Grounds, Without Regard To The Question Sought To Be Raised By The Petition For Certiorari.	12
A. By accepting the award of the assessors, the plaintiff is estopped (and had waived any alleged right) to contest the validity of the condemnation proceedings instituted by Transco.	12

TABLE OF CONTENTS (Continued)

Page

B. By accepting the award of the assessors, the plaintiff made an election of remedies which bars this action. 13

C. A judgment of the superior court of Gwinnett County, Georgia, adverse to the plaintiff, is res judicata as to the claim asserted by the plaintiff in this action. 13

D. Plaintiff is barred by laches from the relief sought. 15

E. The district court was prohibited by the provisions of 28 U.S.C. §2283 from enjoining the pending appeal taken by the defendant from the assessors' award in the Superior Court of Gwinnett County, Georgia. 17

CONCLUSION 19

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

Page

Amalgamated Clothing Workers v. Richmond Brothers Co., 348 U.S. 511, 75 S. Ct. 452 (1955) 18

Baber v. Texas Utilities Co., 228 F. 2d 665 (C.A. 5th, 1956) 18

Black v. Barnes, 215 Ga. 827, 829, 114 S.E. 2d 38, 39 (1960) 16

Collins v. Laclede Gas Co., 237 F. 2d 633 (C.A. 8th, 1956), cert. den., 352 U.S. 1025, 77 S. Ct. 591 (1957) 18

Evans v. St. Louis Housing Auth., 226 F. 2d 750 (C.A. 8th, 1955) 18

Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 612, 64 S. Ct. 281, 291-92 (1944) . 11

First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152, 66 S. Ct. 906 (1946) 11

Holt v. Parsons, 118 Ga. 895(1), 45 S.E. 690 (1903) . 16

Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S. 498, 62 S. Ct. 384 (1942) 10

Natural Gas Pipeline Co. of America v. Illinois Commerce Commission, 33 Ill. 2d 214, 210 N.E. 2d 490 (1965) 10

Oakland Club v. South Carolina Public Service Auth., 110 F. 2d 84 (C.A. 4th, 1940) 8

Sigue v. Texas Gas Transmission Corp., 235 F. Supp. 155 (D.C. La., 1964), aff'd 354 F. 2d 40 (C.A. 5th, 1965) 10

Stitt v. Manufacturers Light and Heat Co., 39 F.P.C. 323 (1968) 10

Thatcher v. Tennessee Gas Transmission Co., 180 F. 2d 644 (C.A. 5th, 1950) 10

Towler v. State Highway Dept., 100 Ga. App. 374, 111 S.E. 2d 154 (1959) 13

TABLE OF AUTHORITIES (Continued)

Page

Williams v. City of LaGrange, 213 Ga. 241, 98 S.E. 2d 617 (1957) 12

Winslow v. Baltimore & Ohio Railway Co., 208 U.S. 59, 28 S. Ct. 190 (1908) 12

Statutes:

15 U.S.C. §717 et seq. (Natural Gas Act) 3, 8

15 U.S.C. §717f(c) (Natural Gas Act §7(c)) 9, 11

15 U.S.C. §717f(h) (Natural Gas Act §7(h)) 7, 8, 9

16 U.S.C. §§791-823 (Federal Power Act) 8

16 U.S.C. §814 (Federal Power Act §21) 7

28 U.S.C. §2283 ..... 2, 3, 17, 18

Ga. Code Ann. §36-201.1 (1929 Ga. L. 219) 2, 6

Miscellaneous:

IB Moore, Federal Practice 521 ¶0.404[7] 15

1947 U.S. Code Cong. Serv. 1477 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1384

BUTELL ROBINSON and DONALD ROBINSON,
Petitioners,

versus

TRANSCONTINENTAL GAS PIPELINE CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions below are correctly presented in the Petition for Certiorari (p. 2; Appendices I, II).

JURISDICTION

The petition for Certiorari (p. 2) adequately sets forth the jurisdictional requisites.

QUESTIONS PRESENTED

I. Whether the issuance of a Certificate of Public Convenience and Necessity by the Federal Power Commission was a condition precedent to the exercise by Respondent (hereinafter sometimes referred to as "Transco" or as "defendant") of eminent domain powers granted by the law of Georgia.

II. Whether Petitioner (hereinafter sometimes referred to as "plaintiff") by accepting the award of the assessors is estopped (or has waived any alleged right) to contest the validity of the condemnation proceedings instituted by the defendant.

III. Whether the plaintiff made an election of remedies by accepting the award of the assessors which bars this action.

IV. Whether a judgment of the Superior Court of Gwinnett County, Georgia, adverse to the plaintiff, is res judicata as to the claim asserted by the plaintiff in this action.

V. Whether the plaintiff is barred by laches from the relief sought.

VI. Whether the district court was prohibited by the provisions of 28 U.S.C. § 2283 from enjoining the pending appeal by the defendant from the assessors' award in the Superior Court of Gwinnett County, Georgia.

STATUTES INVOLVED

1929 Ga. Laws 219 et. seq., which is the source for the unofficial codification contained in Ga. Code Ann. Section 36-201.1 (referred to in the Petition for Certiorari, p. 3) provides in pertinent part as follows:

> "Section 1. The power of eminent domain is hereby granted to and conferred upon persons who are or may be engaged in constructing or operating pipelines for the transportation and/or distribution of natural or artificial gas for heating, lighting, and/or power purposes in the State of Georgia.
>
> ". . . .
>
> "Section 3. Be it further enacted by the authority aforesaid, that the word 'persons' as herein used

shall include individuals, partnerships, associations, and corporations, domestic or foreign, and shall include the singular as well as the plural."

28 U.S.C. § 2283 provides as follows:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

STATEMENT OF THE CASE

This is a diversity action (R. 3) in which the plaintiff seeks to enjoin the defendant from prosecuting an appeal of an award by assessors in condemnation proceedings in the Superior Court of Gwinnett County, Georgia, and to recover damages for alleged injury to plaintiff's real property. (R. 11-12) The defendant filed a motion for summary judgment based upon the pleadings, certain stipulated facts, and two affidavits which defendant served with its motion. (R. 21) Two counteraffidavits were filed by the plaintiff. The district court granted the motion. That judgment was affirmed by the Court of Appeals for the Fifth Circuit in an appeal taken by the plaintiff. The salient facts of this case, which are summarized below, are based upon the complaint and such affidavits.

Transco is a natural gas company as defined by the Natural Gas Act (15 U.S.C. § 717 et seq.), and operates and maintains a pipeline system through which it transports natural gas in interstate commerce through facilities originating in the State of Texas to consumers in Mississippi, Alabama, Georgia, New York, and intermediate states. (R. 3-4)

On or about December 23, 1964, Transco served notice

upon the plaintiff that Transco sought to condemn a right-of-way and easement over certain land of the plaintiff in Gwinnett County, Georgia, for the purpose of laying, constructing, maintaining, operating, etc. pipe lines for the transportation of natural gas. (R. 5-7; 50-57) Immediately following the statement of the interest Transco sought to condemn, the notice states that the same is "all in accord with the Statutes of the State of Georgia made and provided therefor." (R. 55)

On January 20, 1965, a majority of the three assessors, assessed the value of the property taken or used in the amount of $2,400, and awarded $8,600 as consequential damages. (R. 7-8; 42-43) Within ten days after the same was made, the award of the assessors was filed and recorded in the Office of the Clerk of the Superior Court of Gwinnett County. (R. 8; 43) Defendant's draft in the amount of the award was delivered to plaintiff and, after presentment, paid. (R. 69) Thereafter on January 26, 1965, Transco filed an appeal to the Superior Court of Gwinnett County, Georgia, as provided by Georgia law. (R. 8; 34-35)

On September 9, 1966, in proceedings before the Federal Power Commission, entitled "Transcontinental Gas Pipe Line Corporation, et al., Docket No. CP 64-270, et al.", Transco was issued a Certificate of Public Convenience and Necessity by such Commission, authorizing the construction of certain facilities in Gwinnett County, Georgia, which included the pipeline across the property of the plaintiff. (R. 8-9; 23; 59-67)

The first work upon plaintiff's property in connection with the construction of such pipeline was done by the clearing crew, which commenced on November 18, 1966 (R. 72)—some eleven months after the assessors' award and approximately five weeks after the certificate had been issued by the Federal Power Commission.

On December 1, 1966, plaintiff filed an answer in the Gwinnett Superior Court (R. 32) alleging that at the time of the condemnation, Transco did not have a Certificate of Public Convenience and Necessity as provided by the Natural Gas Act. (R. 32-33) Transco filed a demurrer and motion to strike such answer, which included the following grounds:

1. No certificate of public convenience was required in order for the condemnation to proceed. (R. 30)

2. By accepting the award of the assessors, plaintiff was estopped to contest Transco's right to condemn. (R. 26)

3. Plaintiff was barred by laches from asserting such defense. (R. 26)

4. Plaintiff could not contest Transco's right to condemn in the same proceeding. (R. 26, 29)

The Gwinnett Superior Court sustained Transco's demurrer and motion to strike" on each and every ground set forth therein." (R. 24)

On October 4, 1967, the instant action was filed in the district court. (R. 3)

SUMMARY OF ARGUMENT

I. The court of appeals decided an issue of Georgia law in accordance with the applicable law of the state and there is no contention to the contrary in the Petition for Certiorari.

II. Although a question of federal law may have been involved collaterally in the decision of the court of appeals, its decision is not in conflict with the decision of another court of appeals, nor with any decision of this Court, nor are there any other reasons to call for the exercise of this Court's power of supervision.

III. The alleged reasons for granting the writ stated in the Petition for Certiorari are totally insufficient to call for review by this Court.

IV. Although the court of appeals correctly decided the case on the grounds stated in its opinion, the decision was correct on several independent grounds, without regard to the question sought to be raised by the Petition for Certiorari.

ARGUMENT

I.

The Court of Appeals Correctly Decided an Issue of State Law.

In the condemnation proceedings in question, Transco exercised substantive eminent domain powers granted by the law of Georgia. Transco comes squarely within the provisions of the 1929 Georgia Act quoted above. It is a person (defined to include corporations, domestic or foreign) who is or may be engaged in constructing or operating pipelines for the transportation of natural gas. Neither that act nor any other provision of Georgia law imposes any conditions upon the exercise of the power. Significantly, the plaintiff has never made any constitutional attack upon the validity of the Georgia statute, nor with respect to its application under the circumstances of this case. Nor does the plaintiff contend in the Petition for Certiorari that Transco does not come within the provisions of the Georgia Act. Indeed, there is no reference at all to the Georgia statute in the plaintiff's complaint. (R. 3-12)

In affirming the judgment of the district court, the court of appeals held *per curiam* that "[t]he district court concluded in a full opinion that Transcontinental was

empowered to condemn a right of way under the applicable Georgia Condemnation Statute, Ga. Laws, 1929, p. 219, et seq., Ga. Code Annot., §36-201.1 (1969 Supp.) . . . ." (Petition for Certiorari, A. 14-15). The district court had held that "[u]nder the Georgia law, there is no express or implied requirement that a natural gas pipeline company obtain a certificate prior to instituting condemnation proceedings." (Petition for Certiorari, A. 9). The district court and the court of appeals have therefore decided what is essentially a question of Georgia law and there is no contention, nor could there be, that it was not decided in accordance with the applicable law of the state.

II.

The Decision by the Court of Appeals On Any Question of Federal Law Collaterally Involved Was Correct and Not in Conflict With the Decision of Any Other Court or Tribunal.

The thrust of the argument in the Petition for Certiorari is that a natural gas company subject to the Natural Gas Act can possess eminent domain powers only under federal law. The existence of condemnation powers under Section 7(h) of the Natural Gas Act, plaintiff contends, precludes such companies from using similar powers under state law. The only rationale for this view is that for a state to furnish authority for condemnation is "obviously what Congress never intended." (Petition for Certiorari, p. 9) In passing upon the effect of similar powers under the Federal Power Act[1] the Fourth Circuit held that:

[1] The legislative history concerning the enacting of §7(h) of the Natural Gas Act, reported in 1947 U.S. Code Cong. Serv. 1477, contains a report from the Federal Power Commission, which states that the proposed amendment to the Natural Gas Act provides for eminent domain rights similar to those provided in Section 21 of the Federal Power Act.

> "The statute, in connection with eminent domain, is too brief and leaves too many gaps. Had Congress intended this Statute as a complete statute of eminent domain, which would serve to exclude the rights of the condemnor under a state law, we are convinced that this Statute would have been far more complete and would have included many provisions which are omitted." *Oakland Club v. South Carolina Public Service Auth.*, 110 F. 2d 84, 86 (C.A. 4th, 1940).

The Natural Gas Act was approved June 21, 1938 (52 Stat. 821-833; 15 U.S.C. §§717-717w). Section 7(h) of the Act (61 Stat. 459; 15 U.S.C. §717f(h)) was not adopted until 1947. In contrast, the parallel provisions of the Federal Power Act (41 Stat. 1074; 16 U.S.C. §814) were a part of the original Federal Power Act approved June 10, 1920. (41 Stat. 1063, 16 U.S.C. §§791-823). For a period of some nine years then, the only eminent domain powers which could be exercised by natural gas companies subject to the Natural Gas Act were those created by state law. There are substantially stronger reasons therefore than were present in the analagous situation under the Federal Power Act, considered by the Fourth Circuit in *Oakland*, for concluding that Congress did not intend to abrogate existing condemnation rights under state law afforded natural gas companies when it adopted the 1947 amendment to the Natural Gas Act. Clearly, there is nothing in the decision by the Fifth Circuit which even remotely creates a conflict with the decisions of other courts of appeal.

III.

The Alleged Reasons for Granting the Writ Are Completely Insufficient.

Plaintiff's stated reasons for granting the writ are without merit. Contrary to the alleged first reason for

granting the writ, the "clear, unequivocal language of the Natural Gas Act" does not require that there be

> "'. . . in force with respect to such natural gas company a Certificate of Public Convenience and Necessity issued by the Commission authorizing such acts or operations;'

"before an interstate pipeline company is authorized to exercise the right of eminent domain." (Petition for Certiorari, p. 6.) Plainly, this is not the language of the Natural Gas Act, but an unwarranted paraphrase formulated by the plaintiff. The clear, unequivocal language of Section 7(c) of the Natural Gas Act (15 U.S.C. 717f(c)) requires such a certificate before a natural gas company "shall engage in the transportation or sale of natural gas . . . or undertake the construction or extension of any facilities therefor . . . ." The evidence is undisputed that Transco did not commence the construction of the facilities in question until some five weeks after the certificate had been issued by the Federal Power Commission (R. 8-9; 22-23; 59-67; 72).

The plaintiff's second stated reason (Petition for Certiorari, p. 6) is that the court of appeals has ignored the language of Section 7(h) of the Natural Gas Act (15 U.S.C. §717f(h)), which confers the right of eminent domain upon

> ". . . any holder of a Certificate of Public Convenience and Necessity . . ."

It is abundantly clear that neither the district court nor the court of appeals has ignored this language, but has recognized that the condition applies only to the exercise of the condemnation powers granted by Section 7(h) of the Natural Gas Act. The Federal Power Commission, which is vested by Congress with the primary jurisdic-

tion for administering the Natural Gas Act, has expressly held that:

> "While the condemnation powers granted to certificate holders by Section 7(h) of the Natural Gas Act operate prospectively from the date of issuance of a certificate, there is nothing in the Act to prevent a natural gas company from condemning in a different manner if so authorized by state law." *Stitt v. Manufacturers Light and Heat Co.*, 39 F.P.C. 323, 324 (1968).

Finally, plaintiff contends that the decision by the court of appeals will somehow frustrate the scheme of regulation of interstate pipeline companies established by Congress. (Petition for Certiorari, pp. 6-7) The point, which plaintiff completely ignores, is that a natural gas company cannot commence construction of facilities until it obtains a certificate from the Federal Power Commission. Should it fail to obtain a certificate authorizing it to construct the proposed facilities after condemning an easement for such purpose under state law, it cannot proceed further. Regulation will not be frustrated. The only result will be a windfall to the landowner who has received compensation for an easement which the gas company cannot use.

The cases cited by plaintiff as ostensible support for the position that a certificate from the Federal Power Commission is a condition precedent to the exercise of eminent domain powers by a natural gas company were also cited in the courts below. As aptly stated by the district court, the cases "fail to fulfill that promise." *Thatcher v. Tennessee Gas Transmission Co.*, 180 F. 2d 644 (C.A. 5th, 1950) (Petition for Certiorari, p. 7), merely upholds the constitutionality of the eminent domain powers granted natural gas companies by the

Natural Gas Act. *Sigue v. Texas Gas Transmission Corp.*, 235 F. Supp. 155 (D.C. La., 1964), aff'd 354 F. 2d 40 (C.A. 5th, 1965) (Petition for Certiorari, pp. 8-9), holds that the federal power of eminent domain under Section 7(h) of the Natural Gas Act may be enforced in a state court in accordance with state procedure. *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498, 62 S. Ct. 384 (1942) (Petition for Certiorari, p. 9), holds that the Natural Gas Act pre-empts any authority on the part of a state commission to require an interstate pipeline company to extend its facilities and supply natural gas to a local distribution company. Similarly, *Natural Gas Pipeline Co. of America v. Illinois Commerce Commission*, 33 Ill. 2d 214, 210 N.E. 490 (1965) (Petition for Certiorari, p. 10), holds that the Natural Gas Act pre-empts regulation by a state commission of the securities of a natural gas company subject to the jurisdiction of the Federal Power Commission. *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, 66 S. Ct. 906 (1946) (Petition for Certiorari, p. 10), holds that the Federal Power Act pre-empts any authority on the part of a state regulatory commission to license the erection of power dams on navigable streams. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 612, 64 S. Ct. 281, 291-92 (1944) (Petition for Certiorari, p. 11), states that under Section 7(c) of the Natural Gas Act, a natural gas company cannot undertake the construction or extension of facilities without first securing a certificate from the Federal Power Commission.

IV.

The Decision of the Court of Appeals Was Correct On Several Independent Grounds, Without Regard to the Question Sought to be Raised by the Petition for Certiorari.

A. *By Accepting the Award of the Assessors, the Plaintiff Is Estopped (and Has Waived Any Alleged Right) to Contest the Validity of the Condemnation Proceedings Instituted by Transco.*

It is undisputed that the plaintiff accepted payment of the sum awarded by the assessors before proceeding to attack Transco's power to condemn. (R. 69) The decisions of the Supreme Court of Georgia clearly establish that by thus accepting the award of the assessors, a landowner is estopped to contest the condemnor's right to condemn. The following is from *Williams v. City of LaGrange*, 213 Ga. 241, 244, 98 S.E. 2d 617, 621 (1957):

> "It has been held in several instances *(Central of Ga. Ry. Co. v. Bibb Brick Co.*, 149 Ga. 38, 99 S.E. 126; *State Highway Dept. v. H. G. Hastings Co.*, 187 Ga. 204, 297, 199 S.E. 793, 133 A.L.R. 1), that, if a property owner accepts the award made by the assessors, he is estopped. This is unquestionably correct, for obviously one can not voluntarily accept the money awarded for his property and still contest the right to condemn."

In *Winslow v. Baltimore & Ohio Railway Co.*, 208 U.S. 59, 62, 28 S. Ct. 190, 191 (1908), a pre-*Erie* decision, this Court made essentially the same holding in the following language:

> "But, by accepting the sum awarded for the land actually taken, they have lost the right to insist that the petition was not maintainable. They cannot

ratify the condemnation by receiving the appraised value of the land condemned and then ask to have the condemnation set aside and annulled; . . . ."

B. *By Accepting the Award of the Assessors, the Plaintiff Made an Election of Remedies Which Bars This Action.*

After accepting the assessors' award, the plaintiff brought this action in which he seeks not only to enjoin the condemnation proceedings in the state court, but asks the district court to go further and award damages for the taking. Plaintiff has plainly elected as his remedy the damages awarded by the assessors in the condemnation case. The following from *Towler v. State Highway Dept.*, 100 Ga. App. 374, 375, 111 S.E. 2d 154, 155 (1959), we submit, is controlling:

> "The filing of a suit independently of the condemnation proceedings and subsequently to the award of the appraisers, in which latter case the condemnee sought to obtain a general judgment for damages, did not affect the right of the condemnee to proceed to have an execution issued on the award in the manner prescribed by Code §3-604. The award could, according to Code §3-607, have been pleaded to the subsequent damage suit, since the obtaining of the valid award of the appraisers, which award was in the nature of a judgment, prevented a further suit on the same cause of action, except such proceeding as was necessary to enforce the award. The award and the proceedings to enforce it were exhaustive of the condemnee's rights in the premises, and no legal judgment could have been rendered in the same."

C. *A Judgment of the Superior Court of Gwinnett County, Georgia, Adverse to the Plaintiff, Is Res*

Judicata as to the Claim Asserted by the Plaintiff in This Action.

As pointed out previously, the plaintiff filed pleadings in the Gwinnett Superior Court contesting the right of Transco to proceed with its appeal of the assessors' award on the ground that Transco did not have a certificate from the Federal Power Commission at the time the condemnation proceedings were instituted. (R. 32-33) Transco filed a demurrer and motion to strike such pleadings, which included the following grounds:

1. No certificate of public convenience was required in order for the condemnation to proceed. (R. 30)

2. By accepting the award of the assessors, plaintiff was estopped to contest Transco's right to condemn. (R. 26)

3. Plaintiff was barred by laches from asserting such defense. (R. 26)

4. Plaintiff could not contest Transco's right to condemn in the same proceeding. (R. 26, 29)

The Gwinnett Superior Court sustained Transco's demurrer and motion to strike "on each and every ground set forth therein." (R. 24) These were clear adjudications that:

1. Plaintiff was estopped to contest Transco's right to condemn the property in question;

2. Plaintiff was barred by laches from asserting any defense in the condemnation proceedings other than the issue of value and damages;

3. There was no requirement or necessity of any certificate of public convenience and necessity in order for the condemnation by Transco to proceed.

The following is from 1B Moore, *Federal Practice* 521 ¶0.404[7]:

> "It follows . . . that in a non-federal matter where the state substantive rule has been established in state court litigation that is still pending or has been dismissed without prejudice, the state rule constitutes the law of the case in another action in the federal court involving the same matter and the same parties, or those in privity with them, unless, of course, the rule enunciated no longer represents the state law."

D. *Plaintiff Is Barred by Laches From the Relief Sought.*

On January 2, 1965, the assessors made an award to the plaintiff for the right-of-way condemned by Transco. (R. 43) Transco was issued a certificate by the Federal Power Commission on September 9, 1966, authorizing the construction of a pipeline across the plaintiff's land. (R. 8-9; 23; 59-67) On November 18, 1966, Transco entered upon the land for the first time with a clearing crew. (R. 72) Shortly before December 1, 1966, the plaintiff allegedly learned that the certificate had not been issued until September 9, 1966. (R. 8-9) On December 1, 1966, plaintiff filed pleadings in the Gwinnett Superior Court, asserting that Transco had not obtained a certificate from the Federal Power Commission at the time the condemnation proceedings were instituted. (R. 32-33) On July 11, 1967, the Gwinnett Superior Court entered an order sustaining Transco's objections to such pleadings. (R. 24)

The complaint in this action was filed on October 4, 1967, almost three months after the date of the order by the Gwinnett Superior Court (R. 3), and shows that Transco had completed construction of its pipeline and

had commenced the transmission of natural gas through the line. (R. 8)

> "A party is not entitled to an injunction when, with full knowledge of his rights, he has been guilty of delay and laches in asserting them, and has negligently suffered large expenditures to be made by another party on whom a great injury would be inflicted by the grant of the injunction." *Holt v. Parsons*, 118 Ga. 895(1), 45 S.E. 690 (1903).

In *Black v. Barnes*, 215 Ga. 827, 829, 114 S.E. 2d 38, 39 (1960), the Supreme Court of Georgia held that:

> "... the plaintiff who stood by for three months and with full knowledge of the facts allowed the defendants to complete substantial portions of the project and to expend large sums of money before he sought to enjoin the construction of the apartment, is estopped to seek to enjoin the completion of the project."

Transco's notice of condemnation was served upon the plaintiff on December 23, 1964. (R. 5) Plaintiff's pleading in the Superior Court of Gwinnett County, which attacked the condemnation proceedings on the ground that Transco did not have a Federal Power Commission certificate at the time the proceedings were instituted, was filed on December 1, 1966—*almost two years later*. There was nothing whatsoever in the notice of condemnation filed by Transco to suggest that it had a certificate from the Federal Power Commission or was purporting to do anything other than exercise eminent domain powers under Georgia law. In any event, there is nothing in the record to explain why plaintiff waited almost eighteen months (R. 75; 77) to resort to the simple expedient of writing a letter to the Federal Power Commission—or

for two years to engage an attorney to raise the issue. (R. 32-33)

E. *The District Court Was Prohibited by the Provisions of 28 U.S.C. §2283 From Enjoining the Pending Appeal Taken by the Defendant From the Assessors' Award in the Superior Court of Gwinnett County, Georgia.*

It is important to emphasize the nature of the action brought by plaintiff in the district court. Transco brought condemnation proceedings against plaintiff in Gwinnett County. The plaintiff participated in the proceedings and accepted the award of the assessors. Transco filed an appeal in the Gwinnett Superior Court in accordance with Georgia law. The plaintiff sought unsuccessfully to obtain an adjudication in the Gwinnett Superior Court that Transco did not have authority to condemn at the time the proceedings were instituted, and to dismiss the appeal. While this appeal was pending, plaintiff filed the instant action seeking to enjoin the appeal in the Superior Court and have the district court assess the damages for the taking by Transco.

In order to reach the claims for damages, the district court in any event would first have to find that the condemnation proceedings in Gwinnett County were invalid, and enjoin the appeal in the Superior Court. Under 28 U.S.C. §2283, the district court plainly may not issue such an injunction. That section provides that:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

There is no act of Congress expressly authorizing an

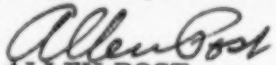
injunction in this case, and clearly an injunction is not necessary in aid of the jurisdiction of the district court or to protect or effectuate its judgments. 28 U.S.C. §2283 is a positive Congressional mandate and limitation on the equity power of district courts. This Court held in *Amalgamated Clothing Workers v. Richmond Brothers Co.*, 348 U.S. 511, 75 S. Ct. 452 (1955), that "Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation . . . ." (348 U.S. at 514)

Closely in point with the instant case is *Collins v. Laclede Gas Co.*, 237 F. 2d 633 (C.A. 8th, 1956), cert. den. 352 U.S. 1025, 77 S. Ct. 591 (1957). There the condemnee contended that the state eminent domain statute in question was unconstitutional. While the case was on appeal to the State Supreme Court, the condemnee brought an action in the federal district court to enjoin the condemnor and certain other defendants from enforcing the decree in condemnation entered by the state court. The district court concluded that "the necessary effect of granting the relief sought in the complaint . . . will be to stay proceedings in a state court" (237 F. 2d at 634), and that 28 U.S.C. §2283 prohibited the court from granting such relief. (237 F. 2d at 635-6) This decision was affirmed on appeal to the Eighth Circuit. To the same effect, see *Baber v. Texas Utilities Co.*, 228 F. 2d 665 (C.A. 5th, 1956); and *Evans v. St. Louis Housing Auth.*, 226 F. 2d 750 (C.A. 8th, 1955).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,



ALLEN POST
Counsel for Respondent

Of Counsel:

Albert G. Norman, Jr.
HANSELL, POST, BRANDON & DORSEY
3300 First National Bank Tower
Atlanta, Georgia 30303

W. Howard Fowler
WEBB & FOWLER
P. O. Box 27
Lawrenceville, Georgia 30245

May 1, 1970

CERTIFICATE OF SERVICE

The undersigned attorney for the Respondent, hereby certifies that copies of the foregoing Brief for Respondent in Opposition to Petition for Certiorari have been served upon counsel of record for the Petitioner by depositing the same in a United States mail box, with first class postage prepaid, addressed to such counsel of record at their post office addresses, as follows:

Hosea Alexander Stephens
2334 National Bank of Georgia Building
Atlanta, Georgia 30303

Joseph E. Cheeley
Buford Commercial Bank Building
Buford, Georgia 30518

Brackett, Arnall & Stephens
2334 National Bank of Georgia Building
Atlanta, Georgia 30303

This 14th day of May, 1970.

Allen Post

ALLEN POST
Counsel for Respondent